

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SmartReply, Inc.,

Plaintiff,

v.

Hartford Casualty Insurance Company, et  
al.,

Defendant.

CASE NO. 2:10-cv-01606-MJP

ORDER ON MOTION FOR  
PROTECTIVE ORDER

The above-entitled Court, having received and reviewed the parties' CR 37 Joint Submission on Plaintiff's Motion for Protective Order (Dkt. No. 32) and all attached declarations and exhibits, makes the following ruling:

IT IS ORDERED that the motion is GRANTED as to the discovery requests of Defendant Axis Surplus Insurance Company.

IT IS FURTHER ORDERED that the motion is DENIED as to the discovery requests of Defendant Hartford Casualty Insurance Company, with the exception of RFA No. 5, for which the Court GRANTS Plaintiff's request for a protective order.

**Background**

Plaintiff SmartReply was sued for violating rights of privacy and violating federal and Washington statutes in the course of making telephone calls to customers of The Talbots and Payless Shoesource. *See Cabbage v. The Talbots, Inc., et al.*, Case No. 2-09-cv-00911-RSM (W.D. Wash.); *Clark, et al. v. Payless Shoesource, Inc., et al.*, Case No. 2:09-cv-00915-JCC (W.D. Wash.). SmartReply was insured by Defendants Hartford Casualty Insurance Company (Hartford) and Axis Surplus Insurance Company (Axis), but Hartford refused to defend under its Commercial General Liability policy and Axis refused to defend under its Professional Liability policy. (Dkt. No. 32 at 1.)<sup>1</sup>

On November 23, 2010, SmartReply moved for summary judgment on both insurers' duty to defend. After that, Hartford and Axis requested discovery on what SmartReply describes as "the merits of SmartReply's [motions for summary judgment]." *Id.*

Upon review it is apparent that the discovery requests from each Defendant are quite different. Axis's interrogatories target the correspondence between SmartReply and three of its clients (two of whom are now suing SmartReply). *Id.*, pp. 6-8. Hartford's discovery request consists of: (1) five Requests for Admission (RFA's) related to choice of law issues (Plaintiff's principal place of business, that it has no place of business in Washington, that the Hartford policies were purchased in California, etc.) and (2) Requests for Production (RFP's) for all documents wherever Plaintiff has denied the RFA. *Id.*, pp. 8-9. For the first four RFA's, Plaintiff has indicated it will respond (although not what its response will be).

The parties agreed to stay the pending summary judgment motion to await a ruling on this issue.

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<sup>1</sup> All citations are to the CR 37 Joint Submission unless otherwise noted.

1       **Discussion**

2       A.     Standard

3             The Court “may, for good cause, issue an order to protect a party or person from  
4 annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1).  
5 The Court should determine “good cause” by balancing the needs for discovery against the need  
6 for confidentiality. Pintos v. Pacific Creditors Ass’n., 605 F.3d 665, 678 (9th Cir. 2009) (citing  
7 Phillips ex rel. Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002)).

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9       B.     Analysis

10            On the surface of their briefing, all the parties seem to agree on a central issue: that there  
11 is no conflict of laws issue, therefore no “choice of law” decision for the Court to make. In the  
12 absence of a choice of law provision in the policies and the absence of a conflict of law between  
13 the competing forums (California and Washington, in this case), the law of the forum  
14 (Washington) applies. In actuality, it is apparent that there are different issues for each  
15 defendant, and the “conflict/choice of law” issue affects each defendant differently.

16            Axis is apparently going to base its “no duty to defend” argument on the allegation that  
17 SmartReply made its request for defense outside of the coverage period in which the claims  
18 against it arose. Axis’s Intro Statement, p. 5. Axis’s discovery requests are aimed at uncovering  
19 the correspondence between Plaintiff and its clients (the companies who are now suing it), and  
20 there appears to be no reason to discover the material except to substantiate its theory regarding  
21 when the claims arose.

22            However, there is case law in both forums which clearly holds that extrinsic evidence is  
23 not discoverable to defeat summary judgment motions in “duty to defend” cases – the defendant  
24 must restrict its arguments to the language of the policy and the allegations of the complaint.

1 Truck Ins. Exchange v. Vanport Homes, Inc., 147 Wn.2d 751, 760 (2002); Haskel, Inc. v.  
2 Superior Court, 33 Cal.App.4th 963, 977-78 (1995). To this extent, there is no “conflict of laws”  
3 issue and hence no choice of law issue. Axis is not entitled to what it seeks under this case law  
4 and Plaintiff is entitled to its protective order as regards Axis’s requests.

5 Hartford, on the other hand, states that (1) it agrees there is no conflict/choice of law  
6 issue but (2) Plaintiff has raised just such an issue in its summary judgment motion and Hartford  
7 is entitled to inquire as to the basis for any potential argument that there is a choice of law issue  
8 to be decided and which forum’s law should prevail. Hartford Intro Statement, pp. 3-4.

9 SmartReply argues that there is no conflict of laws or choice of law issue, but its  
10 summary judgment briefing belies that argument. In its summary judgment opening brief,  
11 Plaintiff attempts to distinguish a recent California case (State Farm Gen. Ins. Co. v. JT’s  
12 Frames, Inc. 181 Cal.App.4th 429 (2010)) which is not favorable to its position. Dkt. No. 21,  
13 Pltf. Mtn., p. 16. On that basis, Hartford argues that it is entitled to explore the evidence which  
14 is relevant to what it views as an impending choice of laws dispute— e.g., the fact that Plaintiff  
15 is not a Washington business, that the contracts were executed in California, etc. This  
16 information does not go to the merits of the case but to the procedural choice of law question,  
17 and on that basis the Court finds that Hartford’s discovery request is outside the prohibition  
18 against discovering extrinsic evidence. Plaintiff will not receive a protective order regarding  
19 these requests.

20 However, as a final matter, the Court agrees with Plaintiff that it should not be required to  
21 admit or deny Hartford’s RFA No. 5 (“Admit that, to the extent that there is any conflict between  
22 California law and Washington law with regard to legal rules and principles relevant to the  
23 parties’ claims, counterclaims and defenses, California law applies and controls.”). This calls for  
24

1 an ultimate legal conclusion which is the sole province of the Court to determine. Plaintiff will  
2 not be required to respond to that RFA.

3 **Conclusion**

4 Plaintiff will be granted its protective order as regards the discovery requests submitted  
5 by Axis and as to Hartford's RFA No. 5. The remainder of the motion for protective order is  
6 denied.

7 Within 5 days of receipt of this order, Plaintiff is directed to re-note its summary  
8 judgment motion. The parties are directed to submit a revised briefing schedule which permits  
9 Plaintiff sufficient time to respond to Hartford's permissible discovery requests and all parties  
10 adequate time to properly prepare their responsive briefing.

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12 The clerk is ordered to provide copies of this order to all counsel.

13 Dated February 3, 2011.

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17 Marsha J. Pechman  
18 United States District Judge  
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